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No. 93-1632

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHNNY ENG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his objection to the district court's exclusion of materials from a prior trial of his co-conspirators.

2. Whether the district court properly increased petitioner's offense level to account for his role in the offense.

3. Whether the district court properly sentenced petitioner to supervised release under 21 U.S.C. 841(b)(1)(A), which requires imposition of a term of supervised release of "at least 5 years" for trafficking in more than one kilogram of heroin, rather than 18 U.S.C. 3583(b), which authorizes a supervised release term of "not more than five years" for a Class A or B felony, "[e]xcept as otherwise provided."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 14 F.3d 165. The oral order of the district court excluding materials from the prior trial (Pet. App. 19a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1994. The petition for a writ of certiorari was filed on April 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conducting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(a) (Count 1); conspiring to distribute heroin and to possess heroin with the intent to distribute it, in violation of 21 U.S.C. 841(b) and 846 (Count 2); importing heroin, in violation of 21 U.S.C. 952(a) (Counts 3, 5, 7, 9, 11, 13); and distributing heroin and possessing heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 4, 6, 8, 10, 12, 14). C.A. App. 60a-66a, 401a. The district court sentenced petitioner to a term of 151 months' imprisonment on the CCE count[1] and concurrent terms of 292 months' imprisonment, to be followed by a lifetime term of supervised release, on the remaining counts of conviction. Pet. App. 7a. The court of appeals affirmed. *Id.* at 1a-18a.

1. From 1987 to 1988, petitioner ran a heroin trafficking operation that imported heroin from Hong Kong for distribution in the United States. Petitioner employed three different methods to import the drugs: transporting them by couriers who flew into New York's John F. Kennedy International Airport, packaging them in parcels mailed from Hong Kong, and concealing them inside a bean sprout washing machine imported from Hong Kong. Pet. App. 3a; Gov't C.A. Br. 3-4.

In early 1987, petitioner paid Wah Tom Lee $50,000 for each of six shipments of heroin that she picked up from couriers traveling through Kennedy Airport. The total amount of heroin delivered by that method was 66 kilograms of heroin. The bean sprout washing machine was used to conceal 78 kilograms of heroin. Pet. App. 3a.

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[1] The conspiracy conviction on Count 2 merged with the CCE conviction on Count 1 for sentencing purposes. See C.A. App. 401a; Pet. App. 10a n.1.

In the spring of 1987, petitioner asked Wah Tom Lee and Michael Yu to recruit individuals to receive drugs sent in parcels from Hong Kong. Yu and Lee obtained the names of three persons, Tina Wong, Cathy Leung, and a woman known as Helen or "Ah Ling," who were willing to receive the packages in return for $20,000 each. After Wong received the first parcel, petitioner instructed Yu and Lee to inspect it at Wong's apartment. They found that the parcel contained stuffed animals, peppers, and numerous tea boxes. The tea boxes contained seven kilograms of heroin. Several days later, petitioner instructed Lee to deliver the heroin to him near a bakery in New York City's Chinatown. At Lee's instruction, Wong brought the heroin to a meeting place near the bakery, met petitioner there, and transferred the package to him. Pet. App. 3a-4a; Gov't C.A. Br. 8-10.

A week later, petitioner informed Lee that a second parcel would arrive soon. Lee, in turn, called Tina Wong, who notified Cathy Leung. After receiving the package, Leung took it to Wong's apartment. Wong examined its contents and informed Lee how much heroin it contained. Lee called petitioner to confirm the delivery. Petitioner instructed her to leave the heroin in Wong's apartment. Later, petitioner asked Lee to deliver the parcel to someone named "Lap." Lee arranged for Wong to deliver the heroin to Lap the following day. Pet. App. 4a; Gov't C.A. Br. 10.

Following the second delivery, Lee and Yu accompanied petitioner to Hong Kong at petitioner's expense. Petitioner introduced Lee and Yu to "Ming," the person who was sending the heroin parcels, and told Ming to contact Yu and Lee if he was not available. Lee provided petitioner with a list of four more people willing to receive packages. Pet. App. 4a; Gov't C.A. Br. 11.

Shortly after the group returned from Hong Kong, four more packages were delivered, each containing seven kilograms of heroin. The third parcel was delivered to Cathy Leung's residence. With petitioner's permission, Lee sold a portion of the heroin to Ching-Yi Chen. At about the same time, Lee and Yu again traveled to Hong Kong, at petitioner's direction, this time accompanied by Tina Wong and two other women. The five of them concealed more than $500,000 on their persons for delivery to Ming. Pet. App. 4a-5a; Gov't C.A. Br. 11-13.

The fourth parcel was delivered to "Helen," and then transferred to Wong's residence. Lee again sold part of the heroin in that parcel to Ching-Yi Chen. The fifth parcel arrived at Agnes Chin's residence, and was stored in Wong's house. Once again, Lee sold part of the heroin in the parcel to Chen. The sixth parcel was delivered in December 1987 or January 1988 to "Helen," who transferred it to Lee. The seventh parcel arrived at Gwendolyn Chan's residence, and was later delivered by Lee to a man named Dai Gow. The eighth shipment arrived in January or February 1988 at Agnes Chin's residence. The package was transferred to Lee, who delivered it to petitioner by placing it in his jeep. Pet. App. 5a; Gov't C.A. Br. 11-14.

On February 9 and 10, 1988, three more boxes from Hong Kong containing heroin and addressed to residences in the New York metropolitan area were intercepted by customs officials in California. One of these packages was marked for delivery to an "M. Hsieh" at Gwendolyn Chan's address. The Drug Enforcement Agency (DEA) conducted a controlled delivery of the package that resulted in Chan's arrest. When Chan agreed to cooperate with the government, the conspiracy began to unravel. That cooperation led to the arrest of Leung, who also agreed to cooperate. Leung's cooperation led to the arrest

of Lee, Yu, and Tina Wong in early March 1988. Pet. App. 5a-6a; Gov't C.A. Br. 14-15.

2. a. The government had presented a somewhat different version of the scheme in another prosecution arising out of the same conspiracy, *United States* v. *Yu*, No. 88-CR-138(S) (E.D.N.Y. verdicts returned Aug. 31, 1988). In that case, the government charged petitioner's co-conspirators, Lee and Yu, and four others with conspiring to distribute drugs and with importing and distributing heroin. The charges stemmed from the same mail parcel deliveries that underlay petitioner's indictment in this case. Pet. App. 6a.[2]

In *Yu*, the government had maintained that Tina Wong delivered the first two packages to Ching-Yi Chen, whereas, in petitioner's case, the government claimed that Wong delivered the first package to petitioner (through Lee) and the second package to "Lap" at petitioner's direction. In the version of events presented by the government at petitioner's trial, Ching-Yi Chen appeared as a buyer of heroin near the end of the scheme, after Yu and Lee had begun to sell the drugs themselves. Pet. App. 6a.

The government's changed account of Chen's role resulted from a re-evaluation of Tina Wong's veracity, prompted in part by the account of the conspiracy provided by Lee after she began to cooperate with the government. Following its reconsideration of Wong's testimony and a polygraph examination of Wong, the government agreed to the vacatur of Ching-Yi Chen's convictions. Chen subsequently pleaded guilty to a one-count informa-

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[2] Both Lee and Yu were convicted following their trial. Yu's conviction, however, was vacated by the district court. Instead of seeking a retrial, Yu decided to cooperate with the government and pleaded guilty to a heroin offense carrying a sentence of up to 20 years' imprisonment. Following her conviction, Lee also decided to cooperate with the government. Gov't C.A. Br. 4 n.2.

tion charging her with conspiring to import heroin, and was sentenced to time served. Pet. App. 6a; Gov't C.A. Br. 20-21.

In the present case, petitioner sought to introduce at trial various materials from the *Yu* case, to show that the government had previously asserted that two of the mail parcels allegedly delivered to petitioner had been delivered to Ching-Yi Chen. Gov't C.A. Br. 19-20. Petitioner sought specifically to introduce the bill of particulars from *Yu* and the Assistant United States Attorney's summation in that case, and also sought to cross-examine a DEA agent about his grand jury testimony in *Yu*. See Pet. 5. During argument on the motion, petitioner's counsel also stated that he had subpoenaed Tina Wong and intended to call her as a witness. Gov't C.A. Br. 21-22.

The district court denied the motion. Pet. App. 19a-28a. After noting its concern about distraction of the jury by extraneous issues, the court ruled that the appropriate way to present the conflict between the government's two versions of the conspiracy was to have Tina Wong and "all of these witnesses testify," *id.* at 22a, thus allowing the jury to assess the witnesses' credibility. *Id.* at 22a-23a. The court also held that it would allow petitioner "to explore with Ms. Wong, [i]f she's called, the fact that she was called by the government in the prior trial," *id.* at 23a, and it observed that, if Wong testified and was cross-examined, there would be "very little lost to the defense." *Ibid.* The district court therefore held that the defense could not introduce the bill of particulars or the government's summation from the *Yu* case or the case agent's grand jury testimony. *Id.* at 24a-28a.

b. Under the 1987 version of the Sentencing Guidelines,[3] the base offense level for petitioner's CCE convic-

[3] The district court did not use the Guidelines in effect at the time of petitioner's sentencing because of concern that they might operate as

tion was 32, and the base offense level for his substantive heroin convictions, which involved ten or more kilograms of heroin, was 36. See Guidelines §§ 2D1.1, 2D1.5 (1987). The district court did not adjust petitioner's offense level for his role in the CCE offense, and it sentenced him to 151 months' imprisonment on that count. For the heroin offenses, the district court added a four-point upward adjustment because petitioner was a leader of the importation organization. On the basis of petitioner's total offense level of 40, the court imposed a 292-month sentence. In addition, the court imposed a lifetime term of supervised release for the heroin offenses, departing upward from the Guidelines. C.A. App. 395a, 398a-399a.

3. The court of appeals affirmed. Pet. App. 1a-18a. It first held (*id.* at 8a)[4] that the district court had properly excluded the materials from the *Yu* trial after concluding that the inconsistency between the government's positions at the two trials would be fully presented to the jury when Wong testified, as petitioner had assured the court she would. The court of appeals then held (*id.* at 8a, 10a) that, because neither the government nor petitioner had called Wong to testify, and because petitioner had not renewed his objection and given the district court the opportunity to reconsider the need for the evidence from the *Yu* trial, petitioner had waived his right to object to the exclusion of the evidence.

The court of appeals rejected petitioner's contention (see Pet. C.A. Br. 37-40) that, because the district court treated all 14 of his convictions as a single group for

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an *ex post facto* law with respect to petitioner's CCE conviction. See Gov't C.A. Br. 38 n.13.

[4] Two pages in the appendix to the petition are transposed. Page 8a should be page 9a, and vice versa. To avoid further confusion, we follow the irregular pagination of the appendix.

sentencing purposes, see Guidelines §§ 3D1.1-3D1.5 (1987), his conviction on the CCE count, which included in its elements a leadership role, should have precluded the district court from increasing his offense level for his leadership role in the substantive drug offenses. The court noted that the Guidelines required the district court to compare aggregated, adjusted offense levels for offenses that are grouped together, and to choose the highest offense level among the grouped offenses when determining the sentence. Pet. App. 11a; see Guidelines § 3D1.3(b) (1987). The court held that the district court had properly combined the substantive heroin counts under the drug quantity aggregation principles of Guidelines § 3D1.2(d) (1987) (Pet. App. 10a-11a), and also had properly adjusted the offense level for those combined heroin counts to reflect petitioner's leadership role (*id.* at 11a). Because the offense level for petitioner's heroin offenses, adjusted to reflect his leadership role, was 40, while his CCE conviction carried an offense level of 32, the district court correctly used the higher adjusted offense level, 40, to determine the combined offense level for the group. *Ibid.*

The court of appeals also rejected (Pet. App. 13a-15a) petitioner's argument that the district court had improperly departed upward from the Guidelines in sentencing him to a life term of supervised release. The court noted (*id.* at 13a) that the 1987 version of the Guidelines provided for a maximum term of five years' supervised release. See Guidelines § 5D3.2(a) (1987). The court held (Pet. App. 14a-15a), however, that, because the 1987 Guidelines had made no distinctions among defendants convicted of smuggling more than ten kilograms of heroin, the Sentencing Commission had not adequately considered the need to impose longer terms of supervised release on defendants who were part of "an extremely large heroin trafficking operation." *Id.* at 15a. The court of appeals therefore con-

cluded that the district court was entitled to depart from the supervised release Guidelines to fashion a sentence "that reflected its concern over the scale of [petitioner's] narcotics activities." *Ibid.*

The court also addressed an issue that it had raised *sua sponte* at oral argument, namely, whether the lifetime term of supervised release imposed by the district court violated 18 U.S.C. 3583(b)(1), which generally establishes a maximum supervised release term of five years for Class A or B felonies, "[e]xcept as otherwise provided." Pet. App 15a-18a. After noting that petitioner was convicted under 21 U.S.C. 841(b)(1)(A), which requires a supervised release term of "at least 5 years," and after reviewing the history of the legislation that established terms of supervised release for drug offenses and inserted the "except as otherwise provided" language in Section 3583(b), the court concluded that Congress intended the specific penalties for drug offenses in 21 U.S.C. 841 to override the general maximum penalties set forth in 18 U.S.C. 3583(b). Pet. App. 15a-17a. The court therefore held (*id.* at 18a) that the district court had not violated Section 3583(b) in imposing a lifetime term of supervised release on petitioner.

ARGUMENT

1. Petitioner contends (Pet. 16-21) that the court of appeals erred when it ruled that he did not adequately preserve his objection to the district court's exclusion of the materials from the *Yu* trial. Petitioner argues (Pet. 17-21) that, because the district court did not state expressly that its exclusion of the *Yu* materials was conditioned on testimony by Tina Wong, the court of appeals' "expansion" of the concept of waiver rests on an inadequate factual foundation. That contention is without merit.

a. The district court's exclusion of the proffered evidence from the *Yu* trial was closely related to the prospect that Tina Wong would testify. See, *e.g.*, Pet. App. 22a (issue of admission of government's summation from earlier trial need not be addressed because witnesses are all available for jury to hear; defense will call Tina Wong if government does not); *id.* at 23a (court will allow defense to explore with Wong, if she is called, fact that she had been called by government in earlier case; allowance of such testimony will permit defense to put before jury fact that government at one time supported Wong's version of events); *id.* at 27a (jury will not be ignorant of fact that Wong testified before and is not now a government witness); *id.* at 28a (court will allow evidence of government's prior belief in witnesses to come in only as to Wong, "who will be able to testify"). In light of these statements by the district court basing its exclusion of the *Yu* materials on the prospect of Wong's testimony, the court of appeals accurately characterized (*id.* at 10a) those materials as "in effect, conditionally excluded." As the court of appeals recognized (*id.* at 8a, 10a), the situation resembled one in which evidence has been conditionally admitted, where the party seeking to exclude the evidence has the burden of renewing its objection if the condition is not satisfied. See, *e.g.*, *United States* v. *Dougherty*, 895 F.2d 399, 403-404 (7th Cir. 1990). Because petitioner did not renew his motion for admission of the *Yu* materials once he decided not to call Wong as a witness, the court of appeals correctly ruled that he had not preserved his objection to their exclusion.

b. In any event, the district court correctly concluded that the probative value of the materials that petitioner sought to introduce was outweighed by the danger that those materials would unduly distract the jury from the

central issues in the case. See Pet. App. 22a-24a; Fed. R. Evid. 403. In the summation in *Yu*, the government relied on the testimony of Tina Wong to argue that the first two mail parcels had been delivered to Chen. That argument, however, was not based on the personal knowledge of any government agent, see Pet. App. 24a, and thus was not the "equivalent of [a] testimonial statement." *United States* v. *McKeon*, 738 F.2d 26, 33 (2d Cir. 1984). Moreover, the difference between that argument and the government's position in petitioner's case had an "innocent explanation," *ibid.*, namely, the government's re-evaluation of Wong's credibility in light of the new evidence supplied by Lee, Yu, and others. Similarly, the case agent's grand jury testimony was based solely on information supplied by Wong and not on the agent's personal knowledge. Pet. App. 23a. Admission of the testimony might have caused the jury to draw unsubstantiated and irrelevant inferences about the agent's own conduct. See *United States* v. *Woo*, 917 F.2d 96, 98 (2d Cir. 1990) (per curiam).

While the bills of particulars filed in *Yu* likewise stated that Chen had received the first two parcels, the alteration in the government's theory of the conspiracy was not based on tactical considerations designed to enhance its chances for success. The change in position thus did not create the potential for unfairness that might have required admission of the bill of particulars. Cf. *United States* v. *GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991); *id.* at 1264 (Altimari, J., concurring) (bills of particulars are "generally of minimal probative value, and will tend to confuse the issues and mislead the jury"; district courts must determine whether "the circumstances of a particular case are sufficiently compelling to necessitate admission"). And since, in this case, petitioner was free, under the district court's ruling, to call Tina Wong to the stand and to question her about her testimony at the prior trial, there

was no danger that the government could "make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts." *Id.* at 1260.

Finally, as the district court pointed out (Pet. App. 27a), because of the defense's lengthy and revealing cross-examination of the cooperating witnesses, the jury was not "ignorant of the use of Mr. Yu, Ms. Lee, how they came to be cooperating, the stages at which certain things came about, the fact that Tina Wong testified before and she is now not a government witness." Petitioner therefore suffered no prejudice from the district court's exclusion of the proffered evidence.

2. Petitioner contends (Pet. 21-27) that the district court erred when it increased his offense level on the substantive heroin counts by four levels to reflect his leadership role in the offense. He argues that the four-level adjustment was improper because the substantive counts were grouped with the CCE count, and because the commentary to the CCE Guideline stated that an "adjustment for role in the offense * * * is not applicable." Guidelines § 2D1.5, Commentary (1987).

Section 3B1.1(a) of the 1987 Guidelines provided for a four-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants[.]" Between January 1987 and September 1988, petitioner orchestrated the importation and distribution of numerous multi-kilogram shipments of heroin. See Gov't C.A. Br. 39. That conduct warranted an upward adjustment for a leadership role in the offense. See, *e.g.*, *United States* v. *Watson*, 988 F.2d 544, 550-551 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994); *United States* v. *Beaulieau*, 959 F.2d 375, 379-380 (2d Cir. 1992).

In addition, the district court employed the correct analysis in grouping petitioner's offenses. The district

court grouped the CCE and substantive heroin counts together under Guidelines § 3D1.2(d) (1987). When counts are grouped together under Section 3D1.2(d), the court must "apply the offense guideline [among the grouped offenses] that produces the highest offense level." Guidelines § 3D1.3(b) (1987). That offense level, in turn, is defined as the level *after* adjustments for matters such as treatment of the victim, role in the offense, and obstruction of justice. See Guidelines § 3D1.3, Commentary (Application Note 1) (1988) ("[T]he 'offense level' for a count refers to the offense level from Chapter Two *after* all adjustments from Parts A, B, and C of Chapter Three.") (emphasis added). These grouping rules thus required the district court first to adjust petitioner's offense level for his substantive heroin violations to reflect his leadership role and then to compare that adjusted offense level to the offense level for the CCE count. See also Guidelines § 1B1.1(c) and (d) (1987) (sentencing court to apply adjustments in Parts A, B and C of Chapter Three before applying grouping analysis in Part D of Chapter Three).[5]

In this case, the CCE offense level obtained from Chapter Two was 32, and the unadjusted offense level for the heroin counts obtained from Chapter Two was, as petitioner concedes (Pet. 24), 36. See *United States* v. *Riles*, 928 F.2d 339, 343 (10th Cir. 1991) (district court must aggregate quantity of drugs in all counts to determine offense level for related drug offenses). After the upward adjustment for leadership role required by Chapter Three, Part B, the offense level for the heroin counts was

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[5] After comparing those adjusted offense levels, the district court was required to choose the highest level as petitioner's offense level for all the grouped offenses, see Guidelines § 3D1.3(b) (1987), and then to consider whether the grouped offense level should be subject to any further adjustment, *e.g.*, for acceptance of responsibility or criminal history. See Guidelines § 3D1.5, Commentary (1988).

40. Since the level for the heroin offenses (40) was higher than the level for the CCE offense (32), the district court correctly used the heroin level as the grouped offense level. See Guidelines § 3D1.3(a) (1987); see also *United States* v. *Morrow,* 929 F.2d 566, 567 (10th Cir. 1991); *United States* v. *Harris,* 959 F.2d 246, 267 (D.C. Cir.), cert. denied, 113 S. Ct. 362 (1992); *United States* v. *David,* 940 F.2d 722, 741-742 (1st Cir. 1991), cert. denied, 112 S. Ct. 2301 (1992).[6]

Petitioner also seeks support (Pet. 24) from Application Note 3 to Guidelines § 3D1.3 to argue that the district court should have determined one combined offense level for all the CCE and substantive heroin offenses before making any adjustments under Parts A, B and C of Chapter Three. That Application Note provides that offense level adjustments under Parts A, B and C of Chapter Three of the Guidelines should be "based upon the combined offense behavior taken as a whole." Guidelines § 3D1.3, Commentary (Application Note 3) (1988). The Note, however, means simply that sentencing courts should consider all of a defendant's relevant conduct when applying the adjustments in Parts A, B and C of Chapter Three. See *United States* v. *Fells,* 920 F.2d 1179, 1184 (4th Cir. 1990) (defendant's role adjustment "is to be based, not solely on his role in the counts of conviction, but on his role in the entirety of the relevant conduct"), cert. denied, 501 U.S. 1219 (1991).

3. Petitioner also contends (Pet. 27-29) that his life term of supervised release exceeded the maximum permis-

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[6] Petitioner's only authority for a contrary rule is a Commentary to Guidelines § 2D1.5 (1987), describing the CCE crime as "one of the most serious forms of ongoing criminal activity." See Pet. 25. There is, however, no indication in either the Guidelines or the Commentary that the Commission intended that the CCE offense should be treated as more serious than substantive drug crimes for every purpose.

sible term for a Class A felony set forth in 18 U.S.C. 3583(b).[7] That Section provides as follows:

> **(b) Authorized terms of supervised release.** – Except as otherwise provided, the authorized terms of supervised release are –
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

The phrase "Except as otherwise provided" means that Section 3583(b) applies only when the specific penalty provision for a particular offense does not define the permissible term of supervised release. See *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988) ("A statute that begins with 'Except as otherwise provided by law' creates a general rule that applies unless contradicted in some other provision."). Section 3583(b) is a default provision to be applied in the absence of another statutory directive.

In this case, that directive was provided by 21 U.S.C. 841, which prohibits the distribution of heroin. Section 841 contains its own supervised release provision that trumps 18 U.S.C. 3583(b). Section 841(b)(1)(A) provides in relevant part:

> Any sentence under this subparagraph shall, in the absence of a prior conviction, impose a term of supervised release of at least 5 years in addition to such

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[7] Petitioner argued in the court of appeals (see Pet. App. 13a-15a) that the district court's upward departure violated his rights under the Ex Post Facto Clause. We do not understand petitioner to press that claim in this Court.

> term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment.

Section 841(b)(1)(A) establishes a mandatory minimum term of supervised release (of five or ten years) but no maximum term. It therefore authorized the life term imposed in this case. Accord *United States* v. *Cardenas,* 917 F.2d 683, 687 (2d Cir. 1990) (defendant could receive life term of supervised release under 21 U.S.C. 841(b)(1)(C)'s provision of minimum term of "at least 3 years").

The legislative history of Section 3583(b) confirms that Congress did not intend the default rules for supervised release to apply to drug trafficking offenses. The supervised release terms authorized by Congress for drug offenses, including those in Section 841, were added in the same statute that amended Section 3583(b) by adding the introductory phrase "[e]xcept as otherwise provided." See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, §§ 1002, 1006, 100 Stat. 3207-3, 3207-6. As the court of appeals explained, the 1986 legislation of which Section 841 was a part was "intended to enhance the penalties available to combat drug offenses. That Congress intended these penalties to override the maximums set by 18 U.S.C. 3583(b) is clear from the fact that Congress simultaneously amended that section to add the phrase '[e]xcept as otherwise provided.' " Pet. App. 17a. See also *United States* v. *LeMay,* 952 F.2d 995, 998 (8th Cir. 1991) (phrase "[e]xcept as otherwise provided" was added to avoid conflict between Section 3583(b) and statutes such as Section 841(b)(1)(A) authorizing longer supervised release terms). The court of appeals thus was correct in holding (Pet. App. 18a) that the district court did not violate Section 3583(b) when it sentenced petitioner to a lifetime term of supervised release.

Although there is a conflict among the circuits on the issue whether the maximum terms of supervised release authorized by 18 U.S.C. 3583(b) apply to drug trafficking offenses that are subject to sentencing under 21 U.S.C. 841, we do not believe that the issue is currently pressing enough to warrant this Court's intervention. Apart from the instant case, the issue has arisen in only a handful of cases in three other circuits. The Eighth Circuit, like the court below, has correctly ruled that the penalty provisions of Section 841(b)(1)(A) override the fall-back provisions of Section 3583(b). See *United States* v. *LeMay,* 952 F.2d at 998. The Tenth Circuit has twice held to the contrary, but in both of those cases the government conceded that Section 3583(b) limited the maximum term of supervised release that a sentencing court may impose. See *United States* v. *Padilla,* 947 F.2d 893, 894 (1991), cert. denied, 113 S. Ct. 2452 (1993); *United States* v. *Esparsen,* 930 F.2d 1461, 1476-1477 (1991), cert. denied, 112 S. Ct. 882 (1992).[8] The only circuit that has rejected the government's argument that Section 3583(b) does not limit the range of supervised release authorized by Section 841(b)(1)(A) is the Fifth Circuit. See *United States* v. *Gracia,* 983 F.2d 625, 630 (1993); *United States* v. *Kelly,* 974 F.2d 22, 24-25 (1992).[9] We are unaware of any cases in other circuits in which this supervised-release issue has been litigated. Because the issue has arisen infrequently in the years since the relevant statutory amendments in 1986 and has not been widely litigated, we do not believe that the issue is of sufficient general importance at present to warrant plenary consideration by this Court.

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[8] We believe that those concessions were erroneous, and the Tenth Circuit may reconsider its view on this issue if it were to arise in the future.

[9] The government did not seek further review in either of those

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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